No. _____

IN THE

Supreme Court Of The United States

October Term, 1966

R. C. WETHERALL, JR. and
PAUL PRICE,

Appellants,

v.

THE STATE ROAD COMMISSION OF
WEST VIRGINIA, a corporation,
and BURL A. SAWYERS, as State
Road Commissioner,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

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MOTION TO DISMISS

Appellees, pursuant to Rule 16(1) (b) of the Revised Rules of the Supreme Court of the United States, move that appellants' appeal be dismissed on the ground that the judgment of the Circuit Court of Kanawha County, West Virginia, rests on an adequate non-federal basis.

STATEMENT OF THE CASE

On October 28, 1960, appellant Price was awarded a contract by appellee State Road Commission involving certain road, dam and causeway construction. On November 29, 1960, Price and appellant Wetherall entered into a contract providing that Wetherall would perform all the work described in Price's contract with the State Road Commission for 90% of the contract price. The State Road Commission was unaware of the contract between Price and Wetherall during the course of the project, which exceeded the scheduled completion date.

Upon eventual completion of the project, a dispute arose between Price, who still represented that he had performed the work, and appellee Road Commission over certain provisions of the job specifications. It was only then that Wetherall made his presence known.

Appellants former appeal to this Court was dismissed in an opinion per curiam on October 25, 1965. (382 U. S. 45). Subsequently, appellants filed their petition for mandamus. The judicial events occurring thereafter are correctly alleged in appellants' jurisdictional statement at pages 3 and 4.

The opinion of the Circuit Court of Kanawha County, West Virginia, dated March 11, 1966, is the opinion from which appeal is sought.

ARGUMENT

I

The decision of the trial court obviously rests on an adequate non-federal ground as far as appellant Wetherall is concerned. As stated in the Court's opinion at page 74a of appellants' jurisdictional statement: "Grounds 8, 9 and 10 of the demurrer, relating only to petitioner Wetherall's claim, asserting that he is not a real party in interest since he was not a party to the contract, are grounds upon which the former proceeding involving these parties was dismissed and are, accordingly, res judicata. * * *" The prior opinion, found at page 25a of appellants' jurisdictional statement, states: "* * * It is, however, my interpretation that the 'real party in interest' provision of Rule 17 was not intended to give a person who is a stranger to a contract, authority to assert the rights of one of the parties merely because the stranger may ultimately derive what is alleged to be the greatest benefit therefrom, as is the case here. * * *"

The fact that the trial court again decided that appellant Wetherall is not a real party in interest as contemplated by Rule 17 (a) of the West Virginia Rules of Civil Procedure (Appendix A) has no bearing upon any federal question. The Supreme Court of the United States will decline to review state court judgements which rest on an adequate, independent state ground, substantive or procedural. Henry v. Mississippi, 379 U. S. 443. It is argued that appellant We-

therall is not a real party in interest and that the trial court's decision stating same was correct. The appeal should be dismissed as to him.

II

Concerning appellant Price, it is true that the Circuit Court of Kanawha County upheld the constitutionality of Article VI, Section 35 of the State Constitution despite appellants' repeated assertions of its repugnancy to the 14th Amendment to the United States Constitution. It is submitted, however, that the judgment as to Price rested on an adequate non-federal ground, independent of the "immunity" clause of the State Constitution. Review by the Supreme Court of the United States is precluded if the state court's judgment rests on an adequate non-federal ground, even if federal questions are involved. Henry v. Mississippi, supra.

It is suggested that the Circuit Court of Kanawha County principally based its decision upon the fact that a proceeding in eminent domain could not be utilized in a case such as was presented. The Court stated, as noted at page 74a of appellants' jurisdictional statement, that the situation was not proper for eminent domain for the same reasons noted in the Howard Price case. The opinion in that case, decided the same day, is reproduced as Appendix E to appellants' jurisdictional statement. At page 78a, we read: "* * * However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding * * *." And, as noted on page

79a, appellants' jurisdictional statement, the trial court stated: "* * * I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here." The Circuit Court of Kanawha County, construing the West Virginia Constitution as it deals with eminent domain, decided that such proceedings were not proper in a contract dispute. The Court also noted that mandamus would not lie in any circumstance where there is no clear legal right to the writ.

III

Appellants' prior appeal was dismissed by this Court in an opinion per curiam at 382 U. S. 45. This Court, citing Howard Price d/b/a Howard Price v. State Road Commission, etc., 382 U. S. 20, stated: "The motion to dismiss is granted and the appeal is dismissed." The other Price case was dismissed by this Court with the following language: "The motion to dismiss is granted and the appeal is dismissed in the light of the representations of the Attorney General of West Virginia that there is open to the appellant an effective state procedure of which he has not availed himself." Appellees motion to dismiss in the former case, set out as Appendix B to appellants' jurisdictional statement, suggested two State remedies. Appellants have tried the suggested remedy of eminent domain but they have failed to submit a claim against the State following the procedures provided by the Legislature. It is suggested that, in its per curiam opinion cited above, this Court did not limit appellants to only one of the two available remedies.

The Legislature of the State of West Virginia, in its 1967 session, established and created a " Court of Claims." The official acts of the Legislature have not yet been codified so the only available reference source is the bill as enrolled in the office of the Secretary of State. The bill, Enrolled Senate Bill No. 332, was passed March 11, 1967 and becomes effective on July 1, 1967. The complete bill is set out in Appendix B to this motion to dismiss. Now, appellant cannot complain that he is forced to submit his claim to the Attorney General, who formerly acted as an administrative agency of the Legislature in the processing and hearing of claims against the State. Under the provisions of the new legislation, appellant as a claimant is entitled to a full evidentiary hearing before the Court of Claims.

It is recognized that the Court of Claims findings are not binding on the Legislature. It is, however, the remedy which the State has provided in cases such as the *one herein*. Appellant has been told that he cannot proceed by way of declaratory judgment or by way of eminent domain. It is apparent that the Court of Claims was created for just such a situation as here exists. Indeed, section 1 of the bill (Appendix B) provides that "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state * * * cannot be determined in the regular courts of the state * * *." The Legislature thus recognized and specifically approved of the immunity clause. In Cunningham v. County Court of Wood County, 148, W. Va. 308, 134 S. E. 2d 725, the West Virginia Supreme Court of Appeals in 1964 considered the doctrine of sovereign immunity.

"* * * Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

CONCLUSION

It is respectfully submitted that the judgment from which appeal is sought rests on on adequate non-federal grounds as to both appellants. Furthermore, an effective State remedy is available in the new Court of Claims. It is argued and submitted that the appeal should be dismissed.

Respectfully submitted,

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APPENDIX A

Rule 17.

Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, or any other fiduciary, or a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by law may sue in his own name without joining with him the party for whose benefit the action is brought; and in subrogation and similar cases, the court shall apply this subdivision as will promote justice. When a law of the State so provides, an action for the use or benefit of another shall be brought in the name of the state or any political subdivision thereof.